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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1953

No. 221

ATLANTIC FREIGHT LINES, INC.,
Petitioner,

vs.

ARTHUR E. SUMMERFIELD,
Postmaster General

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 221

ATLANTIC FREIGHT LINES, INC.,

vs.

Petitioner,

ARTHUR E. SUMMERFIELD,

Postmaster General

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Atlantic Freight Lines, Inc., a corporation under the laws of the Commonwealth of Pennsylvania, by its undersigned attorney and counsellor, prays that a writ of certiorari issue to review the judgment entered in this case on April 2, 1953 by the United States Court of Appeals for the District of Columbia.

Opinions Below

The opinion of the District Court (R. 13), is unreported. The opinion of the Court of Appeals (R. 18) is reported at 204 F. (2d) 64.

Jurisdiction

The judgment of the Court of Appeals was entered on April 2, 1953 (R. 20). On July 1, 1953, an order was made by the Chief Justice extending the time for filing petition to and including July 31, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and 2101(c).

Questions Presented

Whether the Postmaster General has statutory authority to engage in the business of advertising the trade name and services of a private commercial corporation operating a railroad for gain and profit, and whether at the suit of a competing carrier of freight by motor truck he may be restrained from issuing and selling to the public a postage stamp bearing such advertisement of the trade name and business of the Railroad.

Statutes Involved

39 U. S. C. 351 (Revised Statutes, Section 3914, derived from Act of June 8, 1872, 17 Stat. 304) provides:

"The Postmaster General shall prepare postage stamps of suitable denominations, which, when attached to mail matter, shall be evidence of the payment of postage thereon."

31 USC 413 (Revised Statutes, Section 3576) provides:

"No portrait shall be placed upon any of the bonds, securities, notes, fractional or postal currency of the United States, while the original of such portrait is living."

39 USC 368 Act of May 11, 1922, 42 Stat. 540) provides:

"The Postmaster General may, under such rules and regulations as he may prescribe, grant permission for the use in first and second class post offices of special canceling stamps or post-marking dies for advertising purposes in

the following cases only: First, where the event to be advertised is for some national purpose for which Congress has made an appropriation; second, where the event to be advertised is of general public interest and importance and is to endure for a definite period of time and is not to be conducted for private gain or profit. Such permit shall not be for a longer period than six months and the duration of the event to be advertised."

The National Transportation Policy (54 Stat. 899) provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for *fair and impartial regulation of all modes of transportation* subject to the provisions of this Act. . . . (Italics supplied.)

Statement

From newspaper publicity following a press release by the Postmaster General, Atlantic Freight Lines, Inc., a Pennsylvania corporation, engaged in business as an interstate common carrier of freight by motor vehicle having its principal office at Uniontown, Fayette County, Pennsylvania, learned of the Postmaster General's intention of issuing a stamp advertising the trade name and business of a competing carrier, the Baltimore and Ohio Railroad, and brought suit for injunctive relief.

The design of the stamp displays a scroll portraying the charter granted to the Railroad by the Maryland Legislature in 1827. Also depicted are three types of locomotives or equipment used by the Railroad at different periods in the development of its business. At the bottom appear the words: The Baltimore & Ohio Railroad, Chartered Feb. 28, 1827, 125 Years of Rail Transportation.

Said Railroad is a corporation, not defunct or extinct, but actively engaged in private business for gain or profit, and is a living and existing legal person or corporate per-

sonality. It is not a charitable or educational corporation (R. 2-3).

Never before in the history of the Post Office Department had a stamp been issued bearing the name or describing the service of a private corporation engaged in commercial enterprise for gain or profit. Prior stamps such as that of 1944 commemorating the "Completion of First Transcontinental Railroad" or the "Trans-Pacific Air Mail" stamp of 1935 did not mention the name of the carriers concerned. The B. & O. stamp is wholly without precedent (R. 11; Ex. E, pp. 101, 135).

Specification of Errors to Be Urged

The Court of Appeals erred in holding that petitioner was not entitled to an injunction.

Reasons for Granting the Writ

The question in the case at bar with respect to the lawfulness of commercial advertising on postage stamps is obviously one of great public importance and affects the proper administration of the postal laws. This Court should determine the scope of the powers conferred upon the Postmaster General by 39 USC 351. Petitioner contends that this provision does not authorize or permit the Post Office Department to go into the advertising business and to publicize the trade name and services furnished by private commercial corporations. We contend that for a proper construction of 39 USC 351 it must be read as containing a public purpose limitation, just as in eminent domain and tax cases. *Loan Assn.* v. *Topeka,* 20 Wall. 655, 664 (1874); *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546 (1946).

Where the line is to be drawn in distinguishing a public purpose or governmental function from the domain of

private enterprise, we are content to concede, is for Congress to decide. Cf. *Ashwander* v. *TVA*, 297 U. S. 288, 340 (1936); *New York* v. *United States*, 326 U. S. 527 (1946). But here Congress has not indicated any intention to authorize the Postmaster General to go into the advertising business.

Not only has Congress not expressed any legislative determination that commercial advertising should be permitted on postage stamps, but Congress has evinced a contrary policy, prohibiting such commercial exploitation. 31 USC 413 and 39 USC 368, set forth above. Moreover the Congressional intent expressed in the national transportation policy of "fair and impartial regulation" of all modes of transportation is violated by the legend on the B. & O. stamp directing attention to "125 Years of *Rail* Transportation".

If the Postmaster General's action is *ultra vires* under a proper construction of the statute, petitioner is entitled to an injunction under the doctrine of *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 689-91, 702 (1949); *Land* v. *Dollar*, 330 U. S. 731 (1947); *Phila. Co.* v. *Stimson*, 223 U. S. 605, 619-20 (1912). In denying relief to petitioner the Court of Appeals has rendered a decision probably in conflict with all the decisions of this Court hereinabove cited and has also misapplied the line of decisions on which the lower courts relied in denying Atlantic's standing to sue: *Ala. Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118 (1939); and *Perkins* v. *Lukens Steel Co.*, 316 U. S. 113 (1940).

That line of cases is distinguishable and inapplicable to the situation here. The injury complained of in those cases was indirect. They involved "two distinct transactions" (302 U. S. at 480): first there was governmental action,

which was then followed by action of competitors of the parties bringing suit.

In the TVA cases the government made loans to utility companies, which then used the money in lawful competition with the utilities bringing suit. There was no legal right to be free from such competition. In the *Perkins* case the government official ascertained the "localities" and the level of prevailing wages therein which had to be paid by bidders selling goods to the government. The steel company which brought suit claimed that it lost contracts to competitors when bids were submitted which included the minimum wages so determined. But what the government official did invaded no right of the steel company. It was just as if the government had decided to buy aluminum products instead of steel, and competing suppliers had made acceptable bids. The steel company had no right to supply the government's requirements, free from the competition of rival suppliers or lower bidders.

Thus in all these cases there was no cause of action, because the damage all resulted from the effects of lawful competition by the competitors, an intervening cause, and not directly from the action of the government.

In the case at bar, on the other hand, Atlantic complains of an injury which results as the direct and proximate consequence of *ultra vires* action by the Postmaster General himself. The complaint is not directed at anything which petitioner's competitor the B. & O. Railroad has done, but at what the Postmaster General himself (without statutory authority) has done.

The lower Court's decision thus amounts to a question-begging determination, by circular reasoning, that petitioner has no right to be free from such direct injury inflicted immediately by the Postmaster General's action; and this conclusion is erroneous if petitioner's construction of

39 USC 351 is correct on the merits and the Postmaster General's action is *ultra vires.*

The Court of Appeals has therefore decided important questions of federal law in a manner conflicting with applicable decisions of this Court. The importance of a correct decision of these questions is of vital interest, not only to petitioner and the postal authorities, but to numerous companies engaged in many types of private business.

The widespread impact of recognition of power in the Postmaster General to permit commercial advertising will affect a multitude of industries. The significance of advertising is perhaps greater in such industries as the tobacco business (as found by this Court in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 797 (1946)) than in the transportation industry, where factors of geographical location and quality of service may be more important than advertising as a means of obtaining traffic. Yet this medium of appeal to the shipping public is of tremendous importance to carriers, and both petitioner and the railroads sponsor radio programs and utilize other media of advertising. But the far-reaching effects of the case at bar vitally affect almost every type of industry and business. Settlement by this Court of the issues involved is manifestly of great public interest and importance.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 15, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 221

ATLANTIC FREIGHT LINES, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 13-15) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 18) is reported at 204 F. 2d 64.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1953 (R. 20). By order of Mr.

Chief Justice Vinson, dated July 1, 1953, the time for filing a petition for a writ of certiorari was extended to and including July 31, 1953 (R. 21). The petition for a writ of certiorari was filed on July 31, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a motor carrier of freight in competition with the Baltimore & Ohio Railroad, has standing to sue to enjoin the Postmaster General from issuing and selling on February 28, 1952, a postage stamp commemorating the 125th anniversary of the granting of the charter to the first common carrier in the United States—the Baltimore & Ohio Railroad.

STATUTE INVOLVED

R. S. 3914, 39 U.S.C. 351, provides as follows:

> The Postmaster General shall prepare postage stamps of suitable denominations which, when attached to mail matter, shall be evidence of the payment of the postage thereon.

STATEMENT

On October 22, 1951, and again on January 14, 1952, the Postmaster General publicly announced that on February 28, 1952, a three-cent stamp would be issued to commemorate the 125th anniversary of the granting of a charter to the first common carrier in the United States—the Baltimore & Ohio Railroad (R. 7-8). The design for the stamp portrays a portion of the charter granted

by the Maryland Legislature in 1827, and superimposed thereon are drawings depicting the three stages in the development of rail transportation. One figure shows a horse drawn vehicle known as "the pioneer car"; another shows the famous "Tom Thumb," first steam locomotive placed in service by the railroad; and the third depicts a modern stream-lined Diesel locomotive. The design bears this legend (R. 2-3, 8):

THE BALTIMORE & OHIO RAILROAD CHARTERED FEB. 28, 1827.
125 YEARS OF RAIL TRANSPORTATION

On January 19, 1952, petitioner wrote the Postmaster General protesting the issuance of the stamp (R. 3). The protest was denied by letter dated January 30, 1952 (R. 3). On February 23, 1952, five days before the issuance of the proposed stamp, petitioner brought this action for injunctive relief (R. 1-6).

In pertinent part, the complaint alleges that petitioner is a common carrier of property by motor vehicle whose routes parallel for substantial distances the rail lines of the Baltimore & Ohio Railroad, and that substantial competition exists between them (R. 2); that the proposed issuance of the stamp is "wrongful, unlawful, injurious to plaintiff, contrary to law, and in excess of defendant's statutory powers" (R. 3); that the Postmaster General has no statutory authority "to engage in private enterprise, to-wit the business of advertising and publicizing the trade name of, and the services offered by, an existing private busi-

ness corporation competitive with plaintiff and other carriers" (R. 3); and that unless the Postmaster General is restrained from issuing the stamp on February 28, 1952, petitioner "will suffer irreparable injury" because "large numbers of this stamp, bearing the objectionable advertising of the trade name and services of plaintiff's competitor as described above will come into the hands of the public throughout the United States" and "it will be impossible for the stamps thus distributed by defendant to be returned to him without having spread abroad the advertisement they bear, after they have once been distributed, whatever the tenor of this Court's decision on the merits might thereafter be." (R. 4-5) The complaint concluded with a prayer for preliminary relief and a request that the Postmaster General be perpetually restrained from issuing the stamp (R. 5).

On February 23, 1952, District Judge Keech issued a rule, returnable February 26, 1952, directing the Postmaster General to show cause why a temporary restraining order or preliminary injunction should not be entered (R. 13-14). In response to the rule, the Postmaster General filed an affidavit and several exhibits (R. 7-12). The affidavit sets forth the Postmaster's statutory authority to superintend the business of the Post Office and to issue stamps, and relates the facts leading to the proposed issuance of the stamp of which petitioner complains. The affidavit states that the issuance of the stamp to commemorate the 125th anniversary of the granting of the charter to

the first common carrier in America was a proper and desirable commemoration of an important event in our national history; that the stamp was not intended to be an advertisement of transportation by rail or an advertisement for the Baltimore & Ohio Railroad; that the issuance of the stamp without the name of the railroad and the date upon which the charter was granted would be meaningless, and would result in tremendous numbers of inquiries to the Post Office Department, thereby causing great expense and inconvenience to the Government; that since 1893 it has been the custom to issue stamps "commemorative of important historical events of national significance and character"; [1] that large numbers of stamps had already been printed and distributed at an expense of many thousands of dollars; that it would be virtually impossible to recall each stamp; and that 400,000 persons had already remitted the cost of first day covers to the Post Office Department in small sums which would be very difficult to return.

On February 27, 1952, the rule to show cause was discharged by District Judge Matthews (R. 13-15). In a memorandum opinion, District Judge Matthews held that the Postmaster General had not exceeded his statutory authority (R. 14). Judge Matthews held further that petitioner had failed

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[1] In this connection, it may be noted that on July 14, 1953, the Postmaster General announced that a special commemorative stamp to commemorate the 50th anniversary of the trucking industry would be issued on October 27, 1953, at Los Angeles, California, in conjunction with the annual convention there of the American Trucking Association.

to allege or show that any of its legal rights had been invaded or threatened, and, accordingly, that petitioner lacked standing to sue (R. 15).

No further application for injunctive relief was made, and the stamp was issued on February 28, 1952. On March 3, 1952, respondent moved that the complaint be dismissed on the ground that petitioner lacked standing to sue (R. 16.) On March 31, 1952, the complaint was dismissed (R. 17). Again, petitioner made no request for injunctive relief pending appeal.[2]

The Court of Appeals affirmed *per curiam,* stating that "it is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such." (R. 18-19.)

ARGUMENT

In arguing that it has standing to enjoin the issuance and sale of the postage stamp in question, which was issued by the Postmaster General on February 28, 1952, petitioner contends here, as it did below, that *Alabama Power Co.* v. *Ickes,* 302 U. S. 464; *Tennessee Electric Power Co.* v. *TVA,* 306 U.S. 118; and *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, are distinguishable and inapplicable

[2] As noted above, the stamp was issued on February 28, 1952, following the discharge of the rule to show cause. We have been advised by the Post Office Department that only about 600,000 stamps out of the total issue of approximately 110,000,000 remain undistributed at this time. It is anticipated that the remaining stamps will be disposed of shortly.

to the present case. Both courts below were unable to see any distinction. We submit that these cases are clearly applicable and that further review is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1953.

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